

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

THE ART INSTITUTE OF PHILADELPHIA
LLC, *et al.*,

Debtors.

Chapter 7

Case No. 18-11535 (CTG)

(Jointly Administered)

GEORGE L. MILLER, Chapter 7 Trustee,

Plaintiff,

v.

TODD S. NELSON, JOHN R. McKERNAN,
SAMUEL C. COWLEY, EDWARD WEST,
MARK A. McEACHEN, FRANK JALUFKA,
J. DEVITT KRAMER, MARK NOVAD, JOHN
DANIELSON, AND MICK BEEKHUIZEN,

Defendants.

JURY TRIAL DEMANDED

Adv. Proc. No. 20-50627 (CTG)

**REQUEST OF DEFENDANTS WEST AND BEEKHUIZEN FOR JUDICIAL NOTICE
IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

In support of their Motion to Dismiss the First Amended Complaint (the “Motion”), Defendants West and Beekhuizen hereby request, pursuant to Rule 201 of the Federal Rules of Evidence, as made applicable to these proceedings by Rule 9017 of the Federal Rules of Bankruptcy Procedure, that the Court take judicial notice of the limited liability company agreement of Education Management LLC, Exhibit 1 to the *Declaration in Support of Motion of Defendants West and Beekhuizen to Dismiss the First Amended Complaint* (the “Kichline Declaration”), filed contemporaneously herewith; the limited liability company agreement of

New Education Management Holdings LLC,¹ Exhibit 2 to the Kichline Declaration; and the limited liability company agreement of New Education Management LLC,² Exhibit 3 to the Kichline Declaration (collectively, the “LLC Agreements”). Messrs. West and Beekhuizen further request that the Court take judicial notice of the certificates of formation and amendment of New Education Management Holdings LLC, Exhibit 13 to the Kichline Declaration, and New Education Management LLC, Exhibit 14 to the Kichline Declaration (collectively, the “Certificates of Formation”).

The LLC Agreements are the organizational documents of the Delaware Holding Companies. *See* D.I. 91 (Amended Complaint) ¶ 10. When considering a motion to dismiss, courts regularly take judicial notice of the organizational documents of business entities, including limited liability company agreements. *See In re Essar Steel Minnesota LLC*, No. 16-

¹ Exhibit 15 to the Kichline Declaration, the first page of the bankruptcy petition for Debtor Education Management Holdings II LLC, states that that entity previously used the name “New Education Management Holdings LLC.” Case No. 18-11501-CTG, D. I. 1 (June 29, 2018). Defendants West and Beekhuizen request that the Court take judicial notice of these facts included in the filings on the docket of Debtors’ bankruptcy proceedings. *See In re Rubicon U.S. REIT, Inc.*, 434 B.R. 168, 174 (Bankr. D. Del. 2010) (taking judicial notice of docket in bankruptcy action); *In re Energy Future Holdings Corp.*, 990 F.3d 728, 737 (3d Cir. 2021) (citing *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999)); *In re W.R. Grace & Co.*, 626 B.R. 217, 237 (Bankr. D. Del. 2021) (“Thus, a bankruptcy court may take judicial notice of its own docket entries, its own records, and contents of court records from other courts in related matters.”) (collecting cases); *In re New Century TRS Holdings, Inc.*, No. 07-10416 (KJC), 2013 WL 5755058, at *1 n.4 (Bankr. D. Del. Oct. 16, 2013) (“Much of this background cites to pleadings, rulings and other events that have taken place during the Debtors’ chapter 11 bankruptcy case, as referenced by the docket numbers to pleadings in the main bankruptcy case.”).

² Exhibit 16 to the Kichline Declaration, the first page of the bankruptcy petition for Debtor Education Management II LLC (together with Exhibit 15 to the Kichline Declaration, the “Petition Pages”), states that that entity previously used the name “New Education Management LLC.” Case No. 18-11494-CTG, D.I. 1 (June 29, 2018). For the reasons explained in footnote 1, Defendants West and Beekhuizen request judicial notice of the facts contained in that bankruptcy petition.

11626 (BLS), 2019 WL 2246712, at *8 (Bankr. D. Del. May 23, 2019) (taking judicial notice of articles of incorporation not attached to the complaint); *Kahn v. Portnoy*, No. CIV.A. 3515-CC, 2008 WL 5197164, at *4 (Del. Ch. Dec. 11, 2008) (“The Court takes judicial notice of the LLC Agreement for purposes of the motion to dismiss.”); *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 975 n. 45 (Del. Ch. 2004) (taking judicial notice of an LLC agreement presented by defendants because “plaintiffs do not dispute its authenticity or plain terms”). Such documents are subject to judicial notice on the ground that they constitute “a fact that can be determined from sources whose accuracy cannot reasonably be questioned.” *Essar Steel*, 2019 WL 2246712, at *8 n.11. On this basis, the Court should take judicial notice of the LLC Agreements when considering the Motion.

With regard to the Certificates of Formation, those documents are public records filed with Delaware’s Secretary of State. As public records, the Court may take judicial notice of them. *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (courts may take judicial notice of “matters of public record”); *Nikolouzakis v. Exinda Corp.*, No. CA 11-1261-LPS-MPT, 2012 WL 3239853, at *5 (D. Del. Aug. 7, 2012) (taking judicial notice of public records, including a document filed with Delaware’s Secretary of State).

Accordingly, Messrs. West and Beekhuizen respectfully request that this Court take judicial notice of the LLC Agreements, the Petition Pages, and the Certificates of Formation.

Dated: April 1, 2022
Wilmington, Delaware

Respectfully submitted,

RICHARDS, LAYTON & FINGER, P.A.

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